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No. 85-694

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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I

QUESTIONS PRESENTED FOR REVIEW

1. What is the applicable rule for accrual of the six month limitation period governing hybrid breach of collective bargaining agreement/breach of duty of fair representation actions against an employer and a union.

2. Should the limitations provision for hybrid actions commence running before an employee discovers he has been injured as a result of the wrongful conduct of the union and his employer, prior to the time all the elements of his causes of action are present.

3. Should the vital objectives of federal labor law, such as fostering the private settlement of disputes, finality of dispute resolution and uniformity, which were relied upon determining the applicable limitation provision for hybrid actions, also be considered in determining the time for accrual of such actions.

4. Even though a hybrid action involves claims of wrongful conduct by both an employer and a union, should the rule for accrual of such an action be based solely on the point of discovery of only the union's breach of duties.

5. Should there be a uniform national rule for accrual of hybrid actions against a union and an employer, as there is a uniform national limitations provision, or may the accrual issue be resolved by looking to state law.

6. Under what circumstances is a genuine issue of fact raised as to the accrual and timeliness of a hybrid breach of collective bargaining agreement/breach of duty of fair representation action and were such circumstances present herein.

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No.

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Douglas A. Dowty, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its opinion and judgment entered by that court on August 9, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 83-3621 (Appendix A1) is presently unreported, but has been recommended by the court for full text publication. The opinion of the United States District Court in Case No. C-3-82-005 (Appendix A10) has been reported. See *Dowty v. Pioneer Rural Elec. Coop., Inc.*, 573 F. Supp. 155 (S.D. Ohio 1983).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was rendered and entered on August 9, 1985 (Appendix A18). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Involved in this action are the following statutes which are reproduced in the Appendix at A20:

29 U.S.C. §160(b), setting forth the applicable statute of limitations (A21)

29 U.S.C. §185, pertaining to suits for violation of collective bargaining agreements (A21)

Ohio Revised Code §2711.08, mandating delivery of written arbitration awards to all parties in interest (A22)

The original disposition of the matter in the district court was made pursuant to Fed. R. Civ.P. 56(b) and (c), pertaining to motions for summary judgment (A22)

STATEMENT OF THE CASE

Petitioner, Douglas A. Dowty, commenced this action on January 8, 1982 claiming, *inter alia*, wrongful discharge by his employer, Pioneer Rural Electric Cooperative, in violation of a collective bargaining agreement and a breach of the duty of fair representation owed to him by his union, the Utility Workers Union of America. The case may be classified as a "hybrid" §301/fair representation action brought pursuant to the Labor-Management Relations Act,

29 U.S.C. §141 *et seq.* Federal court subject matter jurisdiction was invoked under 28 U.S.C. §185(a).

The factual beginning point herein is the formal arbitration of a grievance concerning petitioner's alleged violation of an "anti-moonlighting rule" promulgated some years after petitioner started a small business selling, servicing and installing electric generators. Petitioner was represented throughout the proceedings by representatives of respondent, union.

After the arbitration panel had reached its decision, petitioner was called to attend a meeting on July 7, 1981, involving three union officials, to discuss the case. The arbitration award (only) was read aloud at the meeting by one of the union officials. However, even though the award language appeared to indicate a different result, the union official incorrectly indicated to petitioner that notwithstanding the terms of the award, he was permitted to continue to sell, service and install electric generators. Further, a union official advised petitioner at the meeting that he would be receiving a copy of both the decision and award by certified mail as his notice of the results.

A few days after the meeting, petitioner received his copy of the arbitration decision and award. With the documents came a letter from his employer, respondent Pioneer, indicating, despite what he had been told by the union, that his position would be terminated in ten days unless he agreed to comply with the language of the award and cease all outside business activity. The instant action was commenced within six months from the day petitioner received the termination letter and his copy of the arbitration results, July 10, 1981, but one day over six months from the July 7, 1981 meeting.

Motions were filed in the district court by both respondents asserting the untimeliness of the action. The district court agreed, holding that under *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151 (1983) the six-month limitation period for bringing a hybrid §301 claim against an employer and breach of the duty of fair representation claim against a union commences to run when the employee knew or should have known about the union's breach of duties (A14). The appellate court, after extensively discussing whether it had jurisdiction given the filing of an early notice of appeal [without mentioning Fed. R. App. P. 4(a)(2)] adopted findings of the trial court and affirmed this dismissal.

The disposition of the instant case under the accrual rule selected by the lower courts, as will be developed, presents the Court with the opportunity to determine the proper standard under which the timeliness of a hybrid §301/fair representation action may be judged. Implicit in this opportunity is the foundation for this petition; whether the accrual rule adopted should reflect the policies expressed in the labor laws of this country and the previous decisions from this Court, a rule not isolated from the critical concerns arising in the ever expanding area of judicial and extrajudicial resolution of employee rights.

REASONS FOR GRANTING THE WRIT

I.

In *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151 (1983), this Court held that the applicable statute of limitations for hybrid actions against both an employer and a union should be the six-month limitation contained in §10(b) of the National Labor Relations Act, 29 U.S.C.

§160(b). The Court, however, has not issued a ruling on when the time limitation accrues, commences running, and at present the lower courts are establishing their own rules. In the instant case, the Sixth Circuit Court of Appeals held the limitation "begins to run in [sic] when the claimant knows or should have known of the union's alleged breach of its duty of fair representation. *Dowty v. Pioneer Rural Elec. Coop., Inc.*, No. 83-3621, slip op. at 7 (6th Cir. 9/9/85) (Appendix A8). The court rejected petitioner's position that the period of limitations should not commence running until he knew or should have known that he had been injured or damaged as a result of the wrongful conduct of the respondents.

Other circuit appellate courts, however, have held that the time of discovery of injury should be considered, at least implicitly recognizing that the element of injury is just as essential to a cause of action as a breach of a legal duty. The court in *Benson v. General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983) held that the employees' claims accrued and the six-month time period commenced running at the time they became aware of the injury complained of, a loss of seniority resulting from the alleged violations. The Eleventh Circuit's ruling in *Benson* was followed by the court in *Farr v. H.K. Porter Co., Inc.*, 727 F.2d 502 (5th Cir. 1984), which remanded the case for consideration of "factual questions such as when the 'injury' actually occurred and when the plaintiffs became aware of it for purposes of the statute of limitations." *Id.* at 506. In a pre-*DelCostello* decision the court in *Price v. S. Pac. Transp. Co.*, 586 F.2d 750 (9th Cir. 1978) held that the employee's fair representation cause of action accrued on the date his petition for reinstatement was denied, finding that no significant union action occurred after that date and that it was "the point at which any injury to

Price allegedly caused by the Union became fixed and reasonably certain." *Id.* at 754. This divergence in rulings merits review of this issue by this Court, particularly given the Court's customary concern for resolving whether there is a need for national uniformity on underlying issues of federal labor law. *DelCostello,* 462 U.S. at 162-3; *Autoworkers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 702 (1966).

II.

National uniformity is not the only concern this Court has considered in resolving limitation questions in the federal labor law area. Logically, if it was sufficiently critical to determine a single national rule as to the applicable limitations provision for hybrid actions given the goals of national labor law (as was accomplished in *DelCostello*), it should be equally imperative to consider the applicable rule for the accrual of hybrid actions given the same important goals. It is especially important for the Court to consider this issue in the case at bar as the accrual rule chosen by the lower courts, as well as their findings given the facts involved, bear no relation to the major objectives which this Court has relied upon in the past.

In *United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56 (1981), this Court held that the applicable limitations provision for §301 breach of collective bargaining agreement claims involving an employer only should be the typically short state statute governing the vacation of arbitration awards. Two years later in *DelCostello* the Court did not follow *Mitchell* in a hybrid action against *both* an employer and a union, finding that the analysis therein suffered "from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid §301/

fair representation litigation." *DelCostello,* 462 U.S. at 165. In concluding that state limitation provisions for vacating arbitration awards do not afford an employee a fair opportunity to preserve his hybrid remedies, the Court observed that a worker is usually unsophisticated in collective bargaining issues and may not be able to investigate his case and analyze his rights in such a short time. *Id.* at 165-6.

Precisely the same concerns are involved on the question of when the limitations period should commence. The Court in *DelCostello* recognized the effect that the time of accrual issue has on the plight of the employee in a footnote to the *DelCostello* opinion. In discussing the problems confronting an employee attempting to evaluate an unfavorable arbitration and the union's handling of the proceedings, the Court observed:

> Moreover, the difficulty of detecting and mustering evidence to show the union's breach of duty may be even greater in these situations, and it may not be an easy task to ascertain when the cause of action accrues—obviously a matter of great importance when the statute of limitation may be as short as 30 days. [as in *Mitchell*]

Id. at 166-7, n.16.

But the question of accrual goes beyond the short time an employee has to institute a hybrid §301/fair representation action, especially given the circumstances in the case at bar. Just as with the choice of the applicable limitations period, the choice of the appropriate time for accrual should reflect the primary goal of federal labor law, "the formation of the collective bargaining agreement and the private settlement of disputes under it." *Hoosier Cardinal,* 383 U.S. at 702. The rule chosen by

the courts below does not and where followed would have the same effect in every hybrid action.

The petitioner herein claims that he did not discover that he had been damaged until he received a written notice of termination from his employer, along with his copies, as promised, of both the arbitration award and decision. Before that time, petitioner had not discovered his injury because his union's representative had told him he could keep his job without having to cease his outside business activity. Petitioner pleaded with the lower courts not to adopt a rule starting the clock running at the time of discovery of the union's breach of duties, as such a rule mandates institution of a hybrid action regardless of whether the employee has been injured as a result; the court system becomes involved simply because the remedy must be preserved. A rule requiring the employee to sue before he is aware that he has been damaged is unjust, expensive, and flies in the face of the recurrently stressed theme of fostering the private, non-judicial resolution of labor disputes. *Hoosier Cardinal.* Nor does such a rule preserve the finality and integrity of such private settlements, also important labor law objectives. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976); *Mitchell*, 451 U.S. at 61, 70, n.7. A lawsuit of uncertain value is literally compelled.

Moreover, if the private system of resolving labor disputes is to be encouraged, certaintly the average worker must be given a fair incentive to support it. This Court has recognized that employee claims "lie at the heart of the grievance and arbitration machinery. . . ." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Fundamental fairness dictates that an employee receive notice of all elements of his hybrid claim before he is required to file a lawsuit.

In particular, the issue was raised below as to whether an employee ought to be entitled to written notice of the results of the hearing of his grievance. Petitioner Dowty herein did attend a meeting with union officials where the arbitration award was read to him, but a union official orally contradicted the written mandate. Within the six-month period preceding the bringing of the instant action, however, petitioner did receive the written arbitration results for his private scrutiny, along with a termination letter from his employer, indicating that the oral representations given in the meeting had absolutely no validity.

Both lower courts herein though rejected petitioner's argument that he ought to be entitled to written notice of the results of his grievance. The Ohio statutes governing arbitrations mandate that written arbitration findings be delivered to each of the "parties in interest", so the district court held that the employee was not a "party in interest" to his own grievance. Ohio Rev. Code Ann. §2711.08 (Page 1981) (Appendix A22). See *Dowty*, 573 F. Supp. at 158 (Appendix A16) citing *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138 (S.D. Ohio 1982). This gives the worker no incentive to put his faith in the grievance system.

Other important considerations underlie petitioner's request that a requirement of written notice be scrutinized. Accrual of an employee's claims as of the date of service of written notice would fix the start of the limitations period with the highest degree of certainty. Requiring the union to provide the written arbitration findings to the employee avoids dissemination of inaccurate information and gives the union an incentive to comply with its duty of fair representation by adequately informing the employees it serves. This court has recently deter-

mined that requiring the union to pay its share of damages in a hybrid action encourages the union to fairly represent its members by processing justified grievances, the same logic applies here. *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983). Perhaps the need for such an incentive herein is confirmed by an observation made in the brief submitted on behalf of respondent, Utility Workers Union, in the Sixth Circuit:

> Given the simple fact that these actions often arise out of situations where an employee is not kept adequately informed of proceedings and their outcomes, the result would be, in the case at bar and in hundreds of similar cases, that the statute of limitations would be tolled for years . . . .

Brief of Respondent at 29.

A review of the harsh result in the instant case would afford the Court the opportunity, as in *Bowen*, to provide the union with an incentive to meet its duty, adequately inform the employees it exclusively represents, and avoid the perceived tolling problem raised in this quote.

III.

To this point, petitioner herein has advanced the need for this Court to establish a uniform, federal rule for accrual of hybrid §301/fair representation actions. The policies underlying federal labor law are best served, in petitioner's position, when the six-month limitation period commences to run on the date an employee learns that he has been injured as a result of the wrongful conduct of the union and employer, not as of the date of such conduct alone. However, in resolving the timeliness of federal causes of action, the Court has traditionally looked to state law. *DelCostello*, 462 U.S. at 158-9. It may well

be asserted by some that the accrual rule should pattern analogous state law, which, under the circumstances herein, would invoke the rule petitioner advances. See *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983). The time of discovery of injury controls in Ohio.

Should this Court accept jurisdiction and adopt the rule that a hybrid §301/fair representation action accrues when the employee knows or reasonably should have known that he has been damaged as a result of the breach of duties owed to him, the Court will also have the opportunity to review the facts regarding petitioner's knowledge and determine whether the lower courts erred in granting summary judgment to respondents. The record clearly demonstrates that at minimum a factual issue existed as to whether petitioner learned of his injury before he received a letter of termination from his employer on July 10, 1981. The instant action was instituted within six months from that date.

CONCLUSION

For all the foregoing reasons petitioner Douglas A. Dowty respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review that court's opinion and judgment.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed August 9, 1985)

No. 83-3621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS A. DOWTY,
Plaintiff-Appellant,

v.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., UTILITY WORKERS UNION OF AMERICA,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Before: MARTIN, CONTIE and WELLFORD, *Circuit Judges.*

PER CURIAM. Plaintiff, Douglas Dowty, brought a hybrid § 301/fair representation claim against defendants Pioneer Rural Electric Cooperative ("Pioneer"), its employees, and the Utility Workers Union of America (the "Union") after an arbitration decision that prohibited him from pursuing a separate private business on pain of discharge. The district court granted summary judgment in favor of the two defendants holding the action was time barred under *DelCostello v. International Brotherhood of*

Teamsters, 462 U.S. 151 (1983). We consider also whether this court has jurisdiction to hear the appeal.

Dowty worked as a lineman for Pioneer. While working for the company on a full-time basis, plaintiff "moonlighted" by selling and installing electrical generators. On September 15, 1980, Pioneer issued a rule which prohibited certain outside employment, including "any form of electrical work." This rule provided an employee the opportunity to cease the activity before being subject to discipline, which might include dismissal.

Shortly after issuing this rule Pioneer informed plaintiff that it would discharge him if he did not cease "moonlighting" in his electrical generator business. Dowty then initiated grievance procedures on November 30, 1980. Plaintiff was terminated for failing to discontinue his outside employment during 1981.

On May 15, 1981, a formal arbitration hearing was held following Dowty's grievance in accordance with the labor contract between Pioneer and defendant Union. The arbitration panel issued its award on June 24, 1981, which gave plaintiff ten days from the receipt of the award to discontinue his outside business as a condition to being reinstated without loss of seniority, but without back pay. Although not reflected in the award, the arbitration decision to which it was attached permitted plaintiff to continue selling the electrical generators, but did not permit him to continue installing or servicing them.

Edward Coggins, the Union's Regional Director, arranged for a July 7, 1981, meeting with plaintiff and two other union officials to discuss what the Union had done in representing Dowty and the status of the arbitration. Prior to the July 7th meeting, Coggins had contacted Harry Sworkin, [sic] the arbitration panel chairman, for a clari-

fication of the last paragraph in the award,[1] specifically to determine what plaintiff would be permitted to do in his outside employment. Coggins claimed that Dworkin indicated that plaintiff could continue to sell electrical generators and perform related work. Coggins, however, noted that at the July 7th meeting plaintiff was read the contents of the arbitration award and had actual knowledge of the Union's position with respect to that award. Plaintiff does not contest that he was made aware of the arbitration award contents at that time.

Plaintiff disputes Coggins' claim with respect to his advice about what plaintiff would be permitted to continue to do under the terms of the award. Dowty claims that at the meeting, Coggins advised him "that under the terms of the Arbitration Decision and Award, [he] could no longer perform any electrical wiring outside of [his] employment with [the Company]." This representation, if made, would not comport with the arbitration panel's decision and award.

At this meeting, Dowty was told that he would receive a copy of the decision and the award by certified mail. He received them on July 10, 1981, but it was not until January 8, 1982, that plaintiff filed his hybrid § 301/fair representation claim in district court.

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1. Paragraph IV of the Award states:

It is the judgment of a majority of the Board of Arbitration that the grievant be accorded an opportunity to determine within ten (10) days from the date of receipt of this Award whether he will agree to discontinue his outside business activity as a condition of being reinstated to his employment, without loss of seniority but without reimbursement for any incidental loss of earnings.

AWARD SIGNED, ISSUED AND DATED BY THE CHAIRMAN, AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 24th DAY OF JUNE, 1981.

Both Pioneer and the Union claimed that plaintiff's claims were barred by the applicable state statute of limitations. The Supreme Court, however, issued its *DelCostello* decision while this case was pending, and the Union (but not Pioneer) filed a memorandum with the district court contending that plaintiff's claims were barred by the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) adopted in *DelCostello*. Immediately after the Union filed its memorandum raising the *DelCostello* defense, Pioneer filed a similar motion.

The district court granted defendants' motions for summary judgment based on the claimed six months' limitation period holding that plaintiff had filed his action one day beyond the limitation period. The court held that the period began to accrue on July 7, 1981, the date of the meeting. The district court, however, noted that "The Court will order that judgment be entered in favor of the Defendants once Pioneer files a *verified* copy . . . of the collective bargaining agreement and the arbitration decision and award with the Court" (emphasis in original). The court's "first" decision was filed August 26, 1983, and plaintiff filed notice of appeal on September 6, 1983, ten days later. It was not until September 16, 1983, that the district court entered "final" judgment in favor of the defendants after receipt of the verified copies as specified in the August 26 order. The court noted in its September 16 order that "Plaintiff filed a Notice of Appeal on September 6, 1983, presumably from this Court's Decision and Entry of August 26, 1983, WHICH WAS NOT A FINAL ORDER. Plaintiff's counsel is urged . . . to file a supplemental Notice of Appeal indicating that the appeal, itself, is taken from the within Order rather than from the Decision of August 26, 1983" (capitalization in original).

Plaintiff, however, did not follow the court's recommendation and never filed a supplemental Notice of Appeal.

We first consider whether plaintiff has properly pursued his appeal to this court despite the fact that none of the parties have discussed this issue.

Plaintiff appealed from the district court's August 26 order, which that court itself characterized as an interlocutory order. Dowty did not follow the court's suggestion to file a supplemental notice of appeal following what the district court deemed to be its final order journalizing the entry of summary judgment in favor of defendants.

If the August 26, 1983, decision is deemed to be a final judgment despite the district court's characterization, then jurisdiction for the appeal lies under 28 U.S.C. § 1291; if it is not a final judgment, however, jurisdiction for this appeal would then have to be considered under 28 U.S.C. § 1292. (The district court never certified its August 26 order for appeal pursuant to § 1292(b).)

The Supreme Court in defining "finality" for purposes of the final judgment rule, has consistently held that an order which leaves nothing more than ministerial acts to be done and which otherwise ends the litigation on the merits meets the final judgment rule's requirements for jurisdiction to lie under 28 U.S.C. § 1291. *See, e.g., Catlin v. United States,* 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"); *Republic Natural Gas Company v. Oklahoma,* 334 U.S. 62, 67-69 (1948):

> the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all

> that needs to be adjudicated is the amount of damages . . . On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable.

See also, Cooper & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). *Brown Shoe Company v. United States*, 370 U.S. 294 (1962), also suggests that jurisdiction does lie for an appeal from the instant case. There the Court found jurisdiction present in an antitrust action in which the order appealed from had disposed of every request for relief in the complaint and required complete divestiture of a subsidiary even though the details of the divestiture had not been ruled upon. *Id.* at 306-11. The Court noted "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." *Id.* at 306.

All that remained for defendants to do to conclude the proceedings under the August 26 order was to submit to the court verified copies of documents, copies of which had already been introduced into evidence. The district court clearly had already then determined the rights and obligations of the parties, and all that remained was the ministerial act of entry of final judgment in the court's records. We conclude under the circumstances that jurisdiction exists in this court to hear plaintiff's appeal.

Since we affirm the grant of summary judgment by the district court, we remand with instructions to enter final judgment *nunc pro tunc* in that court as of August 26, 1981, since the contents of the arbitration decision and award were then indisputedly known by all parties and the court.

As noted, plaintiff filed his complaint on January 8, 1982. If his cause of action accrued on July 7, 1981, when he learned of the arbitrator's award then the six month limitations period in § 10(b) time bars this action. *See Smith v. General Motors Corp.*, 747 F.2d 572 (6th Cir. 1984) (en banc). If, as claimed by plaintiffs, his action accrued on July 10 when he actually received the arbitration papers then the instant action is not time-barred.

Plaintiff's own affidavit introduced into evidence indicates that he learned of the actual contents of the arbitration panel's award on July 7 when he met with union officials to discuss the situation. He had actual knowledge then of the award regardless of what the union officials told him about discontinuing his "moonlighting." He also knew on July 7 what the union had done in pursuing his grievance to arbitration and that the union would no longer contest the award which adversely affected him.[2] There was no substantial factual controversy, then, concerning what plaintiff reasonably knew about the union's alleged breach of duty and the company's right to insist upon its rule limiting his outside business pursuits on July 7, 1981.

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2. In addition to that part of the award set out in footnote 1, it provided, in pertinent part:

> The Board of Arbitration finds and determines on the basis of the evidence adduced at the arbitration hearing, and consideration of documentary exhibits, and post hearing briefs, that the company's policy prohibiting certain types of "after-hours" work, or "moonlighting" on the part of its employees is reasonable, and within the recognized rights of management . . . .
>
> . . . the company's policy was orally communicated to the grievant in 1973 at the time he was hired, and that said policy was set forth in written form in 1977, ...
>
> The union is accorded the contractual right in each instance to challenge a plant rule, or policy unilaterally drafted by the company including the right to grieve the application of a rule . . . .

For purposes of a hybrid § 301/unfair representation action, the time the statute of limitations begins to run in [sic] when the claimant knows or should have known of the union's alleged breach of its duty of fair representation. *See Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984); *Metz v. Tootsie Roll Ind., Inc.*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 976 (1984); *Santos v. District Council*, 619 F.2d 963, 969 (2d Cir. 1980); *Shapiro v. Cook United, Inc.*, No. 83-3087, slip op. at 3 (6th Cir. 5/17/85) (per curiam); and *Northwest Ind. Credit Union v. Salisbury, et al.*, No. 84-1115 (6th Cir. 7/11/85) (unpublished per curiam).

Regardless of plaintiff's belief of what the arbitration award entailed, he claimed, essentially, that the Union had not adequately prepared and presented his position during the arbitration hearing. Dowty, however, knew of or learned about all the facts relating to the Union's preparation of his case by the July 7 meeting. Coggins' assertion was not contradicted that plaintiff had read the Union's post hearing brief several times. We find no error, then, in the determination by the district court:

> During the meeting held on [July 7, 1981], plaintiff learned of the arbitration panel's decision, read the hearing briefs of the union, . . . and was informed of the response of the union to the decision. At that time, he was also aware of the union's conduct during the grievance and arbitration procedure, including the fact that the union had refused to permit him to be represented by his own counsel. *By July 7, plaintiff was armed with all the facts with which he (or his attorney) needed to draft [¶ 23 in the complaint], which alleges that the union breached its duty of fair representation.* In short, by July 7, 1981, plaintiff

> "knew or reasonably should have known that" the union, in his opinion had breached its duty of fair representation.

(emphasis added).

We are not persuaded by plaintiff's argument that he cannot be deemed to have knowledge until he receives *formal* notice of the arbitrator's decision and award. Failure of an employee to receive a copy of an arbitration decision does not toll the running of limitations periods in § 301 actions when he knows what the union has done to represent his interests and essentially the disposition of his grievance. *See Brown v. Duff Truck Lines, Inc.*, 557 F. Supp. 194, 196 (S.D. Ohio 1983). To uphold plaintiff's contention, as the district court cogently noted, even if a claimant knew about the contents of an arbitration decision, his cause of action would never accrue if he never obtained a copy of the decision. We reject plaintiff's contention accordingly.

We affirm the judgment of the district court that the six month's limitation bars plaintiff's claims but remand for entry of the district court's final judgment as of August 26, 1981.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed August 26, 1983)

Case No. C-3-82-005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS A. DOWTY,
Plaintiff,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE INC., *et al.*,
Defendants.

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DEFENDANT UNION'S MOTION TO FILE MEMORANDUM SUSTAINED; MEMORANDUM DEEMED FILED; FURTHER PROCEDURES ORDERED OF COUNSEL FOR DEFENDANT PIONEER

Plaintiff brings this suit under §301 of the Labor Management Relations Act (LMRA) of 1947, 29 U.S.C. §185, against his former employer, Defendant Pioneer Rural Electric Company, Inc. (Pioneer), and his former union, the Utility Workers Union of America. Both Defendants have moved (Docs. #8 & 9) to dismiss or for summary judgment, on the ground that Plaintiff's lawsuit is barred by the applicable statute of limitations. This Court agrees with the Defendants and, for the reasons outlined below, sustains said motions.

I.

An examination of the record reveals the following facts. Plaintiff worked for Pioneer and was a member of the union. Pioneer and the union entered into a collective bargaining agreement, which contained a grievance procedure, culminating in final and binding arbitration. From 1973 until his termination in 1981, Plaintiff engaged in outside employment involving electrical work. On September 15, 1980, Pioneer issued Policy Rule 6-R, forbidding employees from engaging in certain types of outside employment; on November 7, 1980, it informed Plaintiff that it would dismiss him pursuant to the new rule. Plaintiff filed a grievance, in which the Union represented him. Pursuant to the procedure, an arbitration hearing was held on May 15, 1981. A three-member arbitration panel issued a decision and award on June 24, 1981. The panel denied the grievance challenging the validity of Rule 6-R, recommended that Plaintiff be given ten days to discontinue certain outside activities in conflict with Pioneer's business, but further stated that Plaintiff should be permitted to *sell* electrical generators, since that would not conflict with Pioneer's business. Decision at 15-16. These holdings, except for the very last, are reflected in the one-page "Award" issued with the decision.

The affidavit of a union official further reveals that Plaintiff attended a meeting on July 7, 1981, with three union officials, at which time Plaintiff was orally informed of the arbitration decision and award. Affidavit of Edward J. Coggins, Jr., attached to Doc. #24, at ¶¶8-14. (The Defendant Union has moved (Doc. #18) to file a supplemental reply memorandum, to which the Coggins affidavit is attached. This motion is sustained. Therefore, the Court has considered the Coggins affidavit in rendering its decision.) At that time, the recommendations of the

panel (reflected in the decision, but not fully in the award) were clarified in that Plaintiff "could continue to sell electrical generators and perform related work, such as servicing and installing electrical generators." ¶12. The officials told Plaintiff that the union would dissent from parts I and II of the award (upholding the validity of Rule 6-R), and concur in parts III and IV of the award (permitting the union to challenge the rule, and giving Plaintiff the opportunity to discontinue his outside activities in ten days). ¶13. Plaintiff was advised "to take his job back in accordance with the terms of the award." ¶14. Plaintiff does not directly contest any of the assertions set forth in the affidavit. However, he states that he was told at the July 7 meeting that he would receive a copy of the decision and award by certified mail (which he did on July 10). Affidavit of Douglas A. Dowty, ¶¶34, attached to Doc. #22. He also contends that Coggins misrepresented, at least in part, the recommendation of the arbitration panel, since their decision gave no option of continuing to "service and install" generators. ¶5.

Plaintiff filed this action on January 8, 1982, as a "hybrid" §301/fair representation lawsuit. In his complaint, he alleged that Pioneer breached the collective bargaining agreement through the promulgation and implementation of Rule 6-R. He also alleged that the Union breached its duty to fairly represent him in the grievance and arbitration procedure,

> by failing to adequately prepare and present plaintiff's position, by failing to offer or allow the assistance of counsel, by failing to object or waiving the objection to the appointment of a non-neutral arbitrator, by concurring in the arbitration award, by failing to further prosecute plaintiff's claim and by failing to take other actions necessary to protect the rights of plaintiff.

Complaint, ¶23.

II.

All the parties in this case have requested the Court to examine various materials outside the pleadings. Accordingly, it is proper to treat Defendants' pending motions as ones for summary judgment, under Fed. R. Civ. P. 56. Under Rule 56, Defendants' motions can only be sustained when the movants conclusively demonstrate, based on the pleadings, affidavits, and other material on record, that there exists no genuine issue of material fact, all evidence and inferences drawn therefrom having been construed in the light most favorable to the party opposing the motion. Fed. R. Civ. P. 56(c); *Board of Education v. Pico*, 102 S.Ct. 2799, 2806 (1982); *Atlas Concrete Pipe, Inc. v. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982).

As noted above, Defendants have moved on the basis that Plaintiff's action is barred by the applicable statute of limitations. The parties agree that the resolution of this issue is controlled by the Supreme Court's recent decision in *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983).[1] There, the Court held that "hybrid" §301 actions, such as this one, would be governed by the six-month limitations period found in §10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b). *Id.* at 2285.

Since the within matter was filed on January 8, 1982, the limitations period must have begun running, at the latest, on July 8, 1981. In other words, Plaintiff's action must have accrued on or after July 8, 1981, to fall

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1. This Court has recently held that *DelCostello* should be applied retroactively, *i.e.*, to all "hybrid" §301 suits pending on the date of that decision. *See, McPeek v. Dayton Forging and Heat Treating Co.*, Case No. C-3-83-04 (S.D. Ohio Aug. ...., 1983).

within the six-month period.[2] The parties vigorously contest *when* this action accrued. Defendants argue that the action accrued on July 7, 1981, when Plaintiff learned of the arbitration award and decision. Plaintiff insists that the accrual date is July 10, 1981, when he received a copy of the arbitration award and decision by mail. While the issue is a very close one, the Court must agree with the Defendant.

This Court has recently observed that a §301 action accrues no later than the time when a Plaintiff "knew or reasonably should have known that [a breach of the duty of fair representation] had occurred, even if some possibility of nonjudicial enforcement remained." *Rose v. General Motors Corp.*, No. C-3-80-389 (S.D. Ohio Jan. 14, 1983), slip op. at 9-10 (*quoting, Santos v. District Council of New York City*, 619 F.2d 963, 969 (2d Cir. 1980)). *See also, Adkins v. General Motors Corp.*, No. C-3-82-011 (S.D. Ohio April 15, 1983), slip op. at 9-13, *appeal and cross-appeal docketed after entry of final judgment*, Nos. 83-3392, 83-3416 (6th Cir. June 14, 1983).[3]

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2. This assumes that the "six months" language from NLRA §10(b) is measured by six *calendar* months, not 180 days. If the latter measurement is used, then, according to the Court's calculations, this action was untimely filed no matter *which* accrual date is utilized (*see*, text, *infra*). If Defendants' date (July 7, 1981) is used, then the action was filed 185 days later; if Plaintiff's date (July 10, 1981) is used, then the action was filed 182 days later.

At least one court has held, without citing authority, that in a §301 suit, the six-month period of NLRA §10(b) is measured by 180 days. *Weller v. G.M.W.*, 548 F. Supp. 560, 562 (N.D. Ill. 1982). On the other hand, most courts seem to assume, without discussion, that §10(b) is measured by six calendar months. *See, e.g., NLRB v. R.L. Sweet Lumber Co.*, 515 F.2d 785, 787 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975). Given that the parties herein apparently assume that the latter measure is correct, the Court will follow the same course.

3. In *Rose, supra*, slip op. at 8 n.3 and *Adkins, supra*, slip op. at 10 n.6, this Court pointed out that the Sixth Circuit,

(Continued on following page)

Applying this test to the facts of this case indicates that the cause of action accrued on July 7, 1981. During the meeting held on that day, Plaintiff learned of the arbitration panel's decision, read the hearing briefs of the union, Coggins affidavit, ¶¶10-11, and was informed of the response of the union to the decision. At that time he was also aware of the union's conduct during the grievance and arbitration procedure, including the fact that the union had refused to permit him to be represented by his own counsel. Doc. #12. By July 7, Plaintiff was armed with all the facts with which he (or his attorney) needed to draft the paragraph in the complaint, quoted above, which alleges that the union breached its duty of fair representation. In short, by July 7, 1981, Plaintiff "knew or reasonably should have known that" the union, in his opinion, had breached its duty of fair representation.

In his memoranda, Plaintiff emphasizes that he did not receive "formal, official notice" of the arbitration decision and award until July 10, 1981, when he received a copy in the mail. Defendants appear to concede as much, but this is beside the point. There is no talismanic nature to Plaintiff receiving, or not receiving, "official" notice of the panel's decision and award. A review of the collective bargaining agreement herein indicates that only

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Footnote continued—

Echols v. Chrysler Corp., 633 F.2d 722, 725-26 (6th Cir. 1980), apparently views the accrual issue to be a matter of *state* law, while other circuits, *e.g.*, *Santos, supra*, 619 F.2d at 968, view it to be a *federal* issue. This disparity is of no consequence since Ohio law regarding accrual of actions is consistent with analogous federal law. *Rose, supra*, slip op. at 8-11. The Ohio Supreme Court's recent adoption of the "discovery" rule in several torts contexts, *e.g.*, *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983) (medical malpractice); *O'Stricker v. Walter Corp.*, 4 Ohio St. 3d 84, 447 N.E. 2d 727 (1983) (asbestos injury), only reinforces this conclusion.

the union and management are formal parties to the arbitration procedure. This Court has previously observed that only formal parties to the arbitration are required to be served with copies of the decision and award, Ohio Rev. Code Ann. §2711.13 (Page 1982), and that failure of the employee to receive a copy of the decision and award simply does not toll the running of limitations periods in §301 actions. *See, Brown v. Duff Truck Lines, Inc.*, 557 F. Supp. 194, 196 (S.D. Ohio 1983), *appeal docketed*, No. 83-3140 (6th Cir. March 1, 1983); *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138, 1145 n.1 (S.D. Ohio 1982). Plaintiff did indeed receive a copy of the decision and award, apparently as a matter of course or practice. But nothing in the record indicates that same was required. Carrying Plaintiff's theory to its logical conclusion would yield the absurd result that, even if an employee otherwise knew of an arbitration decision, his §301 action would *never* accrue if he never received a copy of same, and he would possess an indefinite ability to file a §301 suit. *See, Brown, supra.* Thus, the Court is not convinced that there is even at least a "jury issue" (a genuine issue of a material fact) as to the date of Plaintiff's "actual notice," as Plaintiff argues, and holds that, on the facts of this case, the date of the "official" notice is irrelevant.

In addition, it appears that a union official at the July 7, 1981, meeting may have slightly misrepresented the nature of the award. As outlined above, the decision and award did not, in fact, permit Plaintiff to service and install electrical generators. Once again, however, this fact has little, if any, bearing on when the action accrued. The misrepresentation does not diminish the fund of knowledge developed by Plaintiff by July 7, 1981, which enabled him to know that the union breached

its duty of fair representation, as outlined in the allegations in his complaint.

The Court is aware that the result in this case may seem harsh. Given an accrual date of July 7, 1981, Plaintiff filed his suit only *one* day late. But the law must draw lines somewhere, and the interests served by the use of NLRA §10(b) as a limitations period in hybrid §301 cases (*i.e.*, the need for uniformity and the rapid resolution of labor disputes, *see, DelCostello,* 103 S.Ct. at 2292-94) would be thwarted if unjustified exceptions were made to the six-month period. To the extent equitable tolling is appropriate in a §301 action, *see, Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 708 (1966), the Court is unaware of any facts in the record which would justify tolling on this case, even for one day.

For all of these reasons, the Court holds that Plaintiff's cause of action accrued on July 7, 1981, and that his filing of suit on January 8, 1981, was untimely, and barred by the applicable statute of limitations.

III.

Based on the aforesaid, the Court sustains the pending motions for summary judgment. The Court will order that judgment be entered in favor of the Defendants once Pioneer files a *verified* copy, Rule 56(e), of the collective bargaining agreement and the arbitration decision and award with the Court, it appearing that the copies of said documents currently in the record are not verified. Counsel should file said documents within ten days after receipt of this entry. The Court will terminate the case upon its docket records once said materials are filed.

/s/ WALTER H. RICE
United States District Judge

JUDGMENT AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 9, 1985)

No. 83-3621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS A. DOWTY,
Plaintiff-Appellant,

v.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.; UTILITY WORKERS OF AMERICA,
Defendants-Appellees.

Before: MARTIN, CONTIE and WELLFORD, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed and the case is remanded for entry of the said District Court's final judgment of August 26, 1981.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as item-

ized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: September 3, 1985

A True Copy.

Attest:

/s/ GARY MCCARTHY
Deputy Clerk

29 U.S.C. §160(b)

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. §185

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

OHIO REVISED CODE

§ 2711.08 Award must be in writing.

The award made in an arbitration proceeding must be in writing and must be signed by a majority of the arbitrators. A true copy of such award without delay shall be delivered to each of the parties in interest. The parties to the arbitration agreement may designate therein the county in which the arbitration shall be held and the award made.

Fed. R. Civ. P. 56

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.